

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MCCAIA,

Defendant-Appellant.

UNPUBLISHED

October 16, 2007

No. 270829

Wayne Circuit Court

LC No. 05-012920-01

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction, to be served concurrently with a sentence of 40 to 60 months for the felon in possession conviction, and consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, but vacate the portion of the judgment of sentence that requires defendant to pay \$1,610 in attorney fees, and remand for further proceedings.

Defendant's convictions arise from the September 3, 2005, shooting death of Anthony Kirk at a house party in Detroit. The prosecutor's theory at trial was that the shooting was motivated by gang rivalry between Kirk and defendant. Some people testified at trial that they overheard Kirk state he was from "the west coast," an insinuation that he was affiliated with the West Coast Boys gang. Others took the remarks to mean that Kirk lived on the west side of Detroit and denied that the victim was a member of any gang at the time of the shooting.

The shooting occurred when defendant approached Kirk at the birthday party and inquired where Kirk lived. According to testimony presented at trial, Kirk stated that he was "from the west coast," and referred to the Warren and Livernois area on the west side of Detroit. Defendant then asked Kirk what he was "saying" or what he "claimed," and made a comment about "claiming the number streets." Kirk responded that he was at the party to have fun and raised his hands in the air as an indication that he did not want any trouble with defendant. However, shortly after the exchange, defendant pointed a gun at Kirk and shot and killed him. Defendant fled the scene following the shooting.

Defendant first argues that the trial court erred in permitting the prosecutor to introduce evidence that defendant was wearing a red shirt, which indicated his affiliation with the Bloods gang. He argues that this evidence was irrelevant because there was no proof that his clothing color was related to gang membership, and was also inadmissible under MRE 404(b)(1). We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 632 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402; *Aldrich*, *supra*. MRE 404(b)(1) prohibits evidence of prior bad acts to prove a person's character, but permits such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act.

Defendant's gang affiliation was relevant to the issue of motive, and such evidence was therefore admissible under MRE 402 and MRE 404(b)(1). See *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Contrary to what defendant argues, the prosecutor did not attempt to draw a connection between defendant's shirt color and the Bloods gang without factual support for defendant's gang affiliation. Defendant's shirt color was not the only evidence that defendant was connected to the Bloods gang. The testimony describing defendant's reaction when Kirk and another guest indicated that Kirk belonged to the West Coast Boys gang, and defendant's comment about "claiming" certain streets, also served as evidence that defendant was motivated by gang rivalry. Accordingly, the trial court did not abuse its discretion in allowing evidence that defendant's red shirt wore the signature color of the Bloods gang.

Defendant also argues that the trial court erred by excluding evidence of Kirk's gang affiliation. The trial court permitted Kelly Forsythe to testify that Kirk was a member of the West Coast Boys gang, and that another guest referred to Kirk as "my West Coast Boy." Indeed, the prosecutor's theory at trial was that defendant was motivated by gang rivalry. Although the trial court excluded evidence that defendant's sister's house was shot up after Kirk's death, the trial court did not exclude this evidence for the reason that it referred to Kirk's gang affiliation, but rather because it involved post-offense conduct that was not relevant to a determination of defendant's guilt or innocence. We agree that evidence of the house shooting was not relevant, because it did not make it either more or less likely that defendant shot and killed Kirk. At most, it could potentially show that Kirk's friends believed that defendant was guilty and sought retribution. Defense counsel's question to Cynthia Reed regarding the West Coast Boys' territory also was not relevant. The question was not calculated to elicit any information pertinent to the question of defendant's guilt or innocence.

Defendant further argues that the trial court erroneously excluded Forsythe's testimony that she was assaulted by another West Coast Boys member who blamed her for Kirk's death. This testimony was relevant under MRE 401, because it suggested an explanation for Forsythe's unwillingness to cooperate with the police investigation and, therefore, was relevant to her bias and credibility. Nonetheless, an error in the admission or exclusion of evidence is not a ground

for reversal unless refusal to take this action appears inconsistent with substantial justice. MCL 769.26. Under this rule, reversal is required only if the error is prejudicial. *People v Mateo*, 453 Mich 203, 212 n 215; 551 NW2d 891 (1996). The defendant claiming error must show that it is more probable than not that the alleged error affected the outcome of the trial, in light of the weight and strength of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 427-428; 635 NW2d 687 (2001). Here, the trial court's error was harmless. Cynthia Reed was permitted to testify about the assault on Forsythe, so Forsythe's testimony would have been cumulative. Moreover, there was substantial direct and circumstantial evidence that defendant shot Kirk. James Thomas testified that he saw the confrontation between defendant and Kirk, and heard the gunshot immediately after defendant's angry reaction. Brian Williams testified that he saw defendant shoot Kirk. The witnesses agreed that Kirk was not armed, and that he tried to defuse the situation by indicating that he had no weapon and no desire for trouble. There was no evidence suggesting that anyone else at the party shot Kirk. Under these circumstances, defendant has failed to show that a more favorable outcome likely would have resulted had Forsythe's cumulative testimony been received. Therefore, reversal is not warranted.

II

Defendant next argues that he was improperly allowed to exercise only 12 peremptory challenges during jury voir dire, instead of 20 as permitted by former MCL 768.13. Because defendant did not object to the limitation restricting him to 12 peremptory challenges, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. See *People v Bell*, 473 Mich 275, 293-295, 301-302; 702 NW2d 128 (2005).

Although former MCL 768.13 provided that a defendant who was on trial for an offense punishable by imprisonment for life was allowed 20 peremptory challenges, MCR 6.412(E)(1) provided that a defendant charged with a life offense was entitled to only 12 peremptory challenges.¹ Because the number of permissible peremptory challenges is a matter of procedure, the court rule prevails. Const 1963, art 6, § 5; *People v Conat*, 238 Mich App 134, 162-163; 605 NW2d 49 (1999). Accordingly, there was no plain error in limiting defendant to 12 peremptory challenges.

III

Next, defendant challenges the trial court's jury instructions for the lesser offense of second-degree murder. After instructing the jury on the different forms of malice necessary to prove second-degree murder, the trial court gave examples to explain the depraved-heart form of malice, i.e., the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Defendant argues that the trial court's examples misled the jury into believing that only circumstances similar to those mentioned in the examples could support a conviction for second-degree murder. Because

¹ MCL 768.13 was amended by 2006 PA 655, effective January 9, 2007, and now provides that a defendant charged with an offense punishable by life in prison is permitted only 12 peremptory challenges, consistent with the court rule.

defendant affirmatively approved the trial court's jury instructions, any error is not merely forfeited, but waived. Appellate review is therefore precluded. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

In any event, we find no plain error. The trial court instructed the jury on the three types of malice that can support a conviction of second-degree murder, namely, an intent to kill, an intent to do great bodily harm, or an intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Because the first two types of malice are self-explanatory, the trial court gave examples intended to illustrate only the third category of malice. The instructions did not suggest that only circumstances fitting the examples could support a conviction of second-degree murder. The trial court otherwise properly instructed the jury on the definitions of both first and second-degree murder, and the instructions explained the salient distinction between first and second-degree murder. Viewed as a whole, the instructions accurately conveyed the elements of both first and second-degree murder and were sufficient to protect defendant's rights. *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005). Thus, there was no plain error.

IV

Defendant also argues that the trial court erred in ordering repayment of attorney fees in his sentencing order. Because defendant did not object to the imposition of attorney fees at his original sentencing or raise this issue in a motion for resentencing, we review this issue for plain error affecting defendant's substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

In *Dunbar*, *supra* at 253-254, this Court held that a constitutionally acceptable attorney fee reimbursement program must include five requirements:

First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy.

With respect to the third requirement, the Court explained that a trial court does not need to make specific findings on the record regarding the defendant's ability to pay, but the court must "provide some indication of consideration, such as noting that it reviewed the financial and

employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. A reimbursement order should be based on the defendant's foreseeable ability to pay, and his capacity for future earnings, not only his present ability to pay. *Id.* at 255.

In this case, the trial court plainly erred by failing to make the requisite findings regarding defendant's foreseeable ability to pay. Accordingly, we vacate the portion of the order requiring defendant to reimburse the county \$1,610 in attorney fees, and remand for reconsideration of this issue.

V. Defendant's Standard 4 Brief

In a supplemental pro se brief, defendant argues that the trial court violated his constitutional right to call witnesses by denying trial counsel's motion for an adjournment. A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007).

Defendant argues that the trial court's denial of his request for an adjournment denied him the opportunity to present a defense. Both the United States and Michigan Constitutions guarantee a defendant the due process right to present a defense, including the right to present witnesses. US Const, Am XIV; Const 1963, art 1, §§ 17, 20. A defendant's right to present his own witnesses is a fundamental element of due process. *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984). Nonetheless, "[i]t is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

In this case, defendant does not explain why he did not have sufficient time to contact the witnesses before the third day of trial. Defendant was aware of the trial's schedule, and was aware that the trial court had denied his pretrial motions for an adjournment.² Under these circumstances, defendant's right to present witnesses was not abridged, but merely subject to reasonable application of procedural rules. *Toma, supra* at 294. We therefore reject this claim of error.

Defendant alternatively argues that trial counsel was ineffective for failing to secure the witnesses' presence on the third day of trial. Because defendant failed to raise this issue in a motion for a new trial or request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or

² Additionally, this Court denied defendant's interlocutory application for leave to appeal the order denying defendant's request for an adjournment. *People v McCaa*, unpublished order of the Court of Appeals, entered April 24, 2006 (Docket No. 269835).

errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

There is no basis in the record for concluding that the absence of defendant's witnesses at trial was due to any deficiency by defense counsel. Additionally, although defendant has submitted statements from three alleged witnesses who claim that they saw Kirk reach for a gun under his clothes before defendant shot him, the statements are unsworn. Thus, defendant has failed to present a competent offer of proof demonstrating factual support for his claim that these witnesses could have provided a substantial defense. Accordingly, the record does not support defendant's claim that counsel was ineffective.

Defendant's convictions and sentences are affirmed. We vacate the portion of the judgment requiring defendant to pay attorney fees and remand to the trial court for reconsideration of this issue consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering